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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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BEECHWOOD RESTORATIVE CARE) 02-CV-6235(L)
CENTER, BROOK CHAMBERY AND)
OLIVE CHAMBERY,)
Plaintiffs)
vs.)
) Rochester, New York
LAURA E. LEEDS, EDMUND RUSSELL) August 6, 2012
ALTONE, SANFORD RUBIN,) 9:30 a.m.
SUSAN T. BAKER, SHARON A. CARLO,)
CYNTHIA T. FRANCIS and ELIZABETH)
RICH,)
Defendants.)
- - - - - X

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE DAVID G. LARIMER
UNITED STATES DISTRICT JUDGE

COURT REPORTER: Christi A. Macri, FAPR, RMR, CRR, CRI
Kenneth B. Keating Federal Building
100 State Street
Rochester, New York 14614-0222

A P P E A R A N C E S

* * *

GEIGER & ROTHENBERG, LLP
BY: DAVID ROTHENBERG, ESQ.
45 Exchange Boulevard
Suite 800
Rochester, New York 14614

- and -

MCCONVILLE CONSIDINE COOMAN & MORIN, P.C.
BY: KEVIN S. COOMAN, ESQ.
25 East Main Street
Suite 400
Rochester, New York 14614
Appearing on behalf of the Plaintiffs

ERIC T. SCHNEIDERMAN, ESQ.
Attorney General of the State of New York
BY: GARY M. LEVINE, ESQ.
BERNARD SHEEHAN, ESQ.
Assistant Attorneys General
144 Exchange Boulevard
Suite 200
Rochester, New York 14614
Appearing on behalf of the Defendants

P R O C E E D I N G S

* * *

(WHEREUPON, the jury is not present).

THE COURT: All right. Good morning, all.

MR. COOMAN: Good morning, Your Honor.

MR. ROTHENBERG: Good morning.

MR. SHEEHAN: Good morning.

MR. LEVINE: Good morning.

THE COURT: Back in the 50's at some point I was reading the other day that Adlai Stevenson, he was either running for governor of Illinois or one of his presidential runs, went to visit a maximum security prison outside of Chicago and he started a speech by saying, "It's good to see all of you here."

There are two ways you can take that: Either he was glad that they were in jail; or he was glad that they came to see him. So, in any event, maybe I'm the captive here, but it is good to see you.

We have a few things to discuss. I hope you all enjoyed your breaks. I guess I'd like to hear maybe first from the defense, and it relates to the renewed request, I guess, to put in some of the stuff relative to the federal determinations, the federal ALJ decisions, and so forth.

When I envisioned -- well, right after the verdict and even before that I viewed our task on August 20th as simply a case of the jury coming in and adding up the numbers, telling us what

1 the amount of damages were or are. Is it \$500,000? Is it
2 1 million? Whatever it is.

3 And I'm sure -- I'm still not sure that that's not the
4 case, and I guess the reason I say that -- at least for the
09:33AM 5 purpose of argument here -- is it's hard for me to understand how
6 what the State did in this case, what the jury found that the
7 State actors did isn't almost, as a matter of law, proximate cause
8 of the injuries.

9 I mean, I'm just having trouble seeing how it could not
09:34AM 10 be. I know we have the defense recent motion *in limine*, but it
11 just seems hard for me to see how a jury couldn't find that what
12 the State defendants did was a cause of the injuries, what was a
13 natural consequence of what the State did that led to the
14 revocation of the operating certificate that closed the place
09:34AM 15 down.

16 Because I'm prepared to instruct the jury that, you
17 know, it doesn't have to be the only cause. Proximate cause is a
18 cause. And there are several cases that we have sort of ferreted
19 out, after receiving the defense motion *in limine*, Second Circuit
09:35AM 20 cases and others, especially *Warner vs. Orange County*, 115 F.3d
21 1068, 115 F. 3rd 1068; *Myers vs. County of Orange*, 157 F.3d 66,
22 157 F.3d 66; and *Back vs. Hastings on Hudson*, 365 F.3d 107, 365
23 F.3d 107.

24 At least the *Back* case was in a summary judgment
09:36AM 25 context, but they all sort of relate to proximate cause and this

1 sort of the issue of intervening causes, and I think they're very
2 instructive to me. But I'm just thinking about this case and what
3 we've heard. There's a part of me that wants to say as a matter
4 of law what happened here was a proximate cause. Period. Ladies
09:36AM 5 and gentlemen, let's focus on whether the plaintiff suffered a
6 dollar injury or, you know, \$100,000, whatever it is.

7 But I guess at the very minimum, Mr. Sheehan, I'm
8 certainly not prepared to say today as a matter of law that there
9 was an intervening cause that precludes plaintiff from recovering
09:37AM 10 more than a dollar.

11 I mean, I suppose we really have to hear the proof, but
12 we've heard most of the proof as to what happened. So whether I
13 go so far -- and I'm just sort of speaking to get the ball rolling
14 here -- whether I go so far as to follow through on my threat
09:37AM 15 that, as a matter of law, proximate cause has been established or
16 whether I submit it to the jury and let you all argue it see what
17 the jury does. The Court can always post-verdict take what action
18 it feels is appropriate.

19 But, I mean, those three cases that I just cited, there
09:37AM 20 were other actors that were involved. Classic case in an
21 employment discrimination area where, you know, a supervisor
22 prepares a negative review that turns out to be racially
23 motivated, or gender discrimination, or in violation of the
24 person's First Amendment rights, and that review gets looked at up
09:38AM 25 the line and eventually the superintendent or the chair, somebody

1 terminates the employee. And the arguments are often made, well,
2 you know, somebody else up the line actually took the action to
3 terminate you, not me. And I think the Circuit's had little
4 trouble dealing with that, and I think the *Back* case discusses
09:38AM 5 that.

6 So, anyway, I mean, Mr. Sheehan, what are you -- what do
7 you think you want to try to show before this jury based on,
8 presumably, the evidence that's been presented to them over six
9 and a half weeks?

09:39AM 10 MR. SHEEHAN: Well, Your Honor, I'm thinking in terms of
11 the *Back* case that you were just talking about. For example,
12 that's typical of some cases where the decision maker got bad
13 evidence or arguably bad evidence.

14 We don't have that here. The evidence HCFA got is the
09:39AM 15 same evidence that the State ALJ got, which is now findings of --
16 which are preclusive in this matter.

17 And what we would like to show, what we intend to show
18 is that based on that evidence that's preclusive, HCFA -- who is
19 an independent decision maker, a totally separate agency -- made a
09:39AM 20 decision, made an independent decision to terminate Beechwood from
21 the Medicare program, which is a completely federal program as
22 well, and that that act constituted the intervening cause because
23 Beechwood could not survive without Medicare funding.

24 THE COURT: Well, they couldn't survive without an
09:40AM 25 operating certificate either.

1 MR. SHEEHAN: But the Medicare termination happened
2 first.

3 THE COURT: By a couple months, true.

4 MR. SHEEHAN: Five or six months, true.

09:40AM 5 THE COURT: But, you know, but the feds really didn't do
6 any separate investigation, as I recall. They took the evidence
7 that the State provided to them --

8 MR. SHEEHAN: Which --

9 THE COURT: -- took a look at it, made the determination,
09:40AM 10 I guess the same determination the State ALJ did.

11 But, I mean, you know, you made this argument during the
12 liability phase that that evidence of what the feds did was
13 something the jury should hear, and the Court precluded that.

14 The Second Circuit when they discussed the case focused
09:41AM 15 on the fact that it was what the State people did, not what the
16 federal people did.

17 So I just wonder if we're not sort of rearguing here,
18 attempting to get in, once again -- I mean, how do you envision
19 the case going in terms of proof? I thought we've got a bunch of
09:41AM 20 experts coming in, we've got the plaintiff prepared to testify
21 about his or their damages, and how did you think --

22 MR. SHEEHAN: You're talking about the offer? The proof
23 we intend to offer I based on the federal ALJ decision?

24 THE COURT: Yeah. What do you want to do?

09:41AM 25 MR. SHEEHAN: I would read in limited portions of it into

1 the record for the jury to show that the federal ALJ made an
2 analysis that the scope and breadth of the decision to
3 terminate to show it was not purely administrative, that there was
4 a substantial analysis based on the evidence presented and --

09:42AM

5 THE COURT: I don't think there's anything in the
6 record --

7 MR. SHEEHAN: I'm sorry, Your Honor?

8 THE COURT: I don't think there's anything in the record
9 about that, is there?

09:42AM

10 MR. SHEEHAN: About?

11 THE COURT: About what the feds did. I mean, I know HCFA
12 made the determination; there was much discussed about that, much
13 discussion, I guess, about e-mails, but it is true that HCFA in
14 June of 1999 took the action they did. I don't have the
15 exhibit number in front of me, but precluded Beechwood from
16 accepting new Medicare/Medicaid payments and patients. That's
17 part of the record.

09:42AM

18 And I would think, I guess, you could stand up and argue
19 that that really was the intervening cause or the primary cause.
20 Is that what you want to do?

09:43AM

21 MR. SHEEHAN: In short-terms, yes, Your Honor.

22 But the federal ALJ decision helps show that it wasn't
23 just a rubber stamp. And just the bare decision to terminate
24 isn't enough to make, in our minds, to make the argument; we would
25 like to present more evidence to the jury.

09:43AM

1 And we're not planning on putting the entire federal ALJ
2 decision in. We have no intention of reading descriptions of
3 treatment and that.

4 It's really just the analysis that was made to show the
09:43AM 5 decision was based on substantial evidence and the scope of the
6 decision generally.

7 THE COURT: Well, so you want to mark the decision? I
8 mean, what practically do you want to do when we start on
9 August 20th when it's your chance to put in proof?

09:43AM 10 What are you going to do? Who are you going to call?

11 MR. SHEEHAN: Well, we intend to call our experts. And I
12 do have some, depending on how the direct goes, of Mr. Chambery
13 and his mother. Mrs. Chambery, we would ask some independent
14 questions. So we would call them as witnesses.

09:44AM 15 THE COURT: About what?

16 MR. SHEEHAN: Oh, just about the various elements of
17 damages.

18 THE COURT: I don't mean that that's --

19 MR. SHEEHAN: I'm just telling you the whole proof, Your
09:44AM 20 Honor.

21 And in terms of the federal ALJ decision, that would
22 just be reading in portions of it. We would not call any
23 witnesses.

24 THE COURT: Well, I don't suppose it's happened yet, but
09:44AM 25 have you and the plaintiffs -- if the Court thinks it's all

1 relevant, is there some ability to construct some type of a
2 stipulation as to what happened? There's a timeline here that I
3 think has been proposed that may be of some assistance, but we're
4 not going to spend days and days dealing with stuff here. I think
09:45AM 5 we've got enough to do just getting in evidence about the damages.

6 But at this point, if I hear you correctly, what you
7 want to do is I guess just without any foundation, just read
8 portions of the ALJ's decision?

9 MR. SHEEHAN: Yes, Your Honor. Then make arguments in
09:45AM 10 closing.

11 THE COURT: Well, my concern is the liability ship has
12 sailed here. We are dealing with the extent of damages that were
13 proximately caused by the jury, found to be the retaliatory acts
14 of the defendants.

09:46AM 15 I'm thinking seriously, although -- well, I'll repeat
16 again. It just seems to me in terms of proximate cause arguments,
17 it's hard for me to construct a scenario where a jury could
18 reasonably find that what the State did wasn't a proximate cause.
19 We're not here dealing like we are in some cases where there may
09:46AM 20 be multiple tort feasons and you may have to apportion damages.

21 I mean, if they find that the defendants' actions were a
22 proximate cause, then plaintiffs are entitled to recover, I think,
23 all the damages from those actors.

24 MR. SHEEHAN: And that's why we're reciting the criminal
09:46AM 25 cases for the idea that when there is an independent decision

1 maker, that can break the chain. And in this case our argument is
2 that HCFA was an independent decision maker and broke the chain of
3 causation.

4 THE COURT: But I think those three cases that I cited
09:47AM 5 indicate that if -- I mean, some of their language, if it's
6 reasonably foreseeable by the tortfeasor here, the State, that
7 others would rely on their decision, then that's proximate cause.

8 I mean, that's the language that all of those cases use
9 is sort of the foreseeability that the State didn't act in a
09:47AM 10 vacuum here. I remember those e-mails that some people said, you
11 know, the feds have our back on this. And it sort of seemed like
12 people could argue that the State and the feds were sort of
13 working hand-in-glove here, but --

14 MR. SHEEHAN: Well, the other element that's missing --

09:47AM 15 THE COURT: It just seems hard to stand up in front of
16 the jury and say, folks, what the State did, it wasn't any cause
17 at all in the damages that occurred here. I mean, really?

18 MR. SHEEHAN: The other part of it, Your Honor, it's not
19 the State, too. It's five defendants.

09:48AM 20 THE COURT: Well, I misspoke.

21 MR. SHEEHAN: But what you're saying is is part of what
22 we would be trying to correct, Your Honor. It's the five -- it's
23 the five defendants' actions, and then there is a consensus, a
24 concurrence and a recommendation to HCFA, which has to happen
09:48AM 25 within the larger part of the Department of Health, 99% of whom

1 are not on trial here.

2 And that's the recommendation that gets passed on to
3 HCFA, who then again looks at the evidence, can choose to do its
4 own investigation or not -- choose to follow-up with DOH or not,
09:48AM 5 and then makes a decision.

6 THE COURT: I guess I would say, okay, let's suppose all
7 that happened. I would say so what? They did what they did.
8 They received information from the State, they relied on the
9 information that the State actors had put together and, yes, they
09:49AM 10 came to a decision.

11 But this case is about what the State did and what
12 damages should be paid to the plaintiffs for what the State did
13 and, you know, if the law was that the State -- I use State just
14 as a shorthand for the defendants -- but if the law is that the
09:49AM 15 defendants' retaliatory acts had to be the only cause or the
16 primary cause, fine, I guess I would warm up to your argument
17 more.

18 But I don't think that's the standard. It just has to
19 be a substantial factor in causing the damages.

09:49AM 20 So let me hear from plaintiffs, but before I do -- so at
21 this point your request is that you be allowed essentially to
22 introduce new evidence to the jury, and that is to read -- you
23 can't agree to a stipulation. Sort of the bottom line is that
24 there was a federal ALJ pleading and the federal people, some time
09:50AM 25 in 2000 or 2001 or whenever it was, made this decision and that

1 decision, I guess, was the result of the appeals that the
2 plaintiff took from the initial HCFA missive that was sent in June
3 of 1999?

4 MR. SHEEHAN: Yes, Your Honor.

09:50AM 5 THE COURT: And then that's the extent of the proof that
6 you would offer on this, what I'll call the "cause issue" here?

7 MR. SHEEHAN: Yes, Your Honor.

8 THE COURT: All right. Mr. Cooman or Mr. Rothenberg?
9 What do you -- I mean, what are your thoughts on my idea that
09:51AM 10 perhaps the Court, as a matter of law, should say what happened is
11 a proximate cause, period, and let's get on with deciding the
12 amount of damages?

13 Keeping in mind that there are appellate courts that
14 would look at this and -- I mean, just for sake of argument here,
09:51AM 15 is that something you request or do you think it's really sort of
16 a classic proximate cause argument?

17 Because I remember when I instructed the jury, I gave
18 them four or five elements of what the cause of action was and I
19 went through three or four of them and that was for the jury, and
09:51AM 20 I remember specifically telling them the final one is if there is
21 liability, were those acts the proximate cause of the damages
22 claimed. And, ladies and gentlemen of the jury, that's not
23 something for you today, that's something for a later time.

24 So this concept of proximate cause has certainly been
09:52AM 25 broached to the jury. Certainly we haven't discussed intervening

1 causes and all that, but -- so my initial thought was this is just
2 a classic proximate cause argument. You know, if the defendants
3 really want to stand up and say whatever we did, it wasn't the
4 proximate cause, keeping in mind what the Court's instructions
09:52AM 5 will be, which will be pretty broad, I think that's their
6 prerogative.

7 But the more I thought about it, I wondered if -- I
8 don't want to say wasting time here, but because I thought the
9 primary focus of this was for the jury, having heard all they
09:52AM 10 heard, to tell us whether damages is \$10 or \$10 million.

11 MR. COOMAN: We essentially agree with the Court. We do
12 think that defendants are permitted to argue that HCFA's
13 termination in June was an intervening cause, superseding cause,
14 if they really think they can make that argument.

09:53AM 15 But that's different from whether they should be allowed
16 to admit any of the two years later administrative law decisions
17 that HCFA gave because the operative act was the administrative
18 *fiat* decision in June of 1999 essentially agreeing or rubber
19 stamping with what its agent had recommended.

09:53AM 20 This is -- that whole agency principle thing is one of
21 the things that points out why it would be very, very difficult to
22 imagine that HCFA's an intervening or superseding cause because by
23 law, the Department of Health is HCFA's agent and you can't
24 imagine how in an agency relationship you could have the principal
09:53AM 25 acting as an independent force with respect to what DOH had done.

1 And, of course, critically all of those things that
2 Mr. Sheehan proposes to get up and read happened two years later.
3 And so they add nothing to the jury's understanding.

09:54AM 4 It's an admitted fact. None of us are going to get up
5 and dispute the fact that HCFA ratified and affirmed what DOH had
6 recommended. It was an accomplished fact in June.

7 Now, we fast forward five months, a revocation occurs.
8 Fast forward another year and a half, you finally get a HCFA
9 post-deprivation administrative determination that the termination
09:54AM 10 was valid.

11 But it doesn't add anything to the analysis because by
12 the time the federal administrative law decisions come out, we've
13 now had revocation. And all the damages after revocation, without
14 question, have to be laid at the doorstep of these defendants
09:54AM 15 because we can't get back in the program.

16 THE COURT: You mean revocation of the operating
17 certificate?

18 MR. COOMAN: Correct, correct.

19 THE COURT: Right.

09:54AM 20 MR. COOMAN: So the only narrow, conceivable things
21 defendants have is to get up and argue that some piece of the
22 damages between June and December of 1999 are really caused by
23 HCFA's administrative action, and that somehow is a superseding
24 intervening cause.

09:55AM 25 And we think the Court can give an instruction on

1 proximate cause and say if you find a superseding intervening
2 cause, you can decide that. But it's very close to a matter of
3 law that that's just not possible here. Very, very close.

09:55AM 4 THE COURT: Well, what do you think I should do? Should
5 I leave it to the jury? Is that argument? Or take it away from
6 them right now?

7 MR. COOMAN: I think the jury can get an instruction
8 about superseding and intervening cause with respect to HCFA.

09:55AM 9 As I understand Mr. Sheehan's last set of arguments at
10 the end of the week, he's actually attempted to come back and say
11 that should be true even with respect to Novello and Zylberberg,
12 and we believe that is absolutely precluded as a matter of law.

13 The Court's instruction to the jury on the liability
14 phase very clearly was saying that the primary adverse action that
09:56AM 15 happened as a result of their conduct was the revocation.

16 And they clearly are all in that same DOH chain, and I
17 don't think the jury could have reached its verdict without having
18 sort of taken a peek, if you will, at the causation element
19 getting to the adverse action because the Court's instruction was
09:56AM 20 in order to find these defendants liable, they must be personally
21 involved in the adverse action.

22 And the Court said two or three times, particularly at
23 pages 16 and 17 of the charge, that adverse action that we're here
24 about is their operating certificate got revoked. So I think, as
09:56AM 25 a matter of law, that argument is precluded.

1 I could see the Court instructing on superseding,
2 intervening about HCFA, and they can argue it for what it's worth.

3 THE COURT: There was sort of part of the defense
4 argument that it sort of sounded like some of the concepts we
09:57AM 5 discussed when we discussed the Supreme Court's *Mount Healthy*
6 decision that, you know, that it would have happened anyway.

7 That certainly was something that was presented to the
8 jury in the liability phase, and I think Mr. Levine argued that
9 and the Court instructed on that.

09:57AM 10 This sort of -- when I read the defendants' papers, I
11 thought we're sort of resuscitating that in a damage context.

12 MR. COOMAN: Exactly. That's exactly our concern about
13 anything about the HCFA administrative law decisions coming in is
14 it's -- when they argue, well, the jury ought to hear those things
09:57AM 15 and then be told those are preclusive, that's *Mount Healthy* all
16 over again, that somehow we would have come out that way anyway or
17 this would at the end of the day come out this same way because of
18 HCFA's administrative action.

19 But that was so far after-the-fact of the bomb having
09:58AM 20 gone off and the dust settled, it doesn't matter. It's very
21 important if you think about the distinction, the continuation
22 between the state and federal process: The state process we got a
23 post-deprivation remedy; there was a hearing before the revocation
24 took place.

09:58AM 25 The fed system is upside down, in Congress' wisdom,

1 where they said administrators do the termination and some day, a
2 year and a half or two down the road, you finally get a hearing to
3 decide whether or not it was valid.

4 And I can tell the Court that, you know, around the
09:58AM 5 country when this happens to nursing homes, routinely by the time
6 you ever get to that decision, the nursing home is back in
7 operation because it's been in -- the restatement process occurs
8 within a matter of months after the termination, which is
9 typically just a temporary phenomenon.

09:58AM 10 Of course, that wasn't possible for Beechwood because
11 you had no license, you had no CON, and we were gone.

12 THE COURT: I remember there was some discussion that,
13 yes, from June on Beechwood couldn't get payment from the feds for
14 Medicare or Medicaid, but they may be able to survive with private
09:59AM 15 pay patients. That, of course, was gone in December of 1999 when
16 the operating certificate was cut off.

17 MR. COOMAN: Correct.

18 THE COURT: Well, I mean, I envision having a verdict
19 sheet for the jury to list damages. I really hadn't thought I
09:59AM 20 would separate the first six months from the jury's damage
21 calculation.

22 MR. COOMAN: I don't think you need to, Your Honor. It
23 would be subsumed in a line that says what do you find the damages
24 to the Beechwood partnership to be?

09:59AM 25 Let's say hypothetically they find, based on our

1 expert's testimony, those damages are millions of dollars and --
2 but they, in their computations in the back room say, well, you
3 know, I really buy that defense argument that it was something
4 else that caused six months of damages. So, you know, they do a
10:00AM 5 little computation and, you know, maybe they cut it down by some
6 amount.

7 But I don't see that that needs to be teased out.
8 That's still within the realm of what do you find Beechwood's
9 damages to be and, you know, the jury will gather up what they
10:00AM 10 hear from the defense expert, our expert, the arguments of counsel
11 and they will come up with a number.

12 THE COURT: Well, when I talked about the verdict sheet
13 having lines, like, for instance, it might be appropriate to have
14 one for lost wages for Mr. Chambery. It might be appropriate to
10:00AM 15 have one for other compensatory damages for humiliation.

16 MR. COOMAN: Correct. Probably a three or four line
17 thing.

18 THE COURT: Yeah, we'll talk about Mr. Chambery's lost
19 wages in a minute here, but -- so the plaintiffs are not warm on
10:01AM 20 my perhaps earlier idea to take this away from the jury at this
21 point as a matter of law *vis-a-vis* the causation?

22 MR. COOMAN: That's correct. I mean, candidly, I guess
23 we don't want to headlight our argument on that.

24 THE COURT: Well, either do I, but it's close. I
10:01AM 25 think --

1 MR. COOMAN: We agree it's very close.

2 THE COURT: Mr. Sheehan, you wanted some rejoinder?

3 MR. SHEEHAN: Just a little bit, Your Honor. Plaintiffs
4 are conceding a superseding charge to that extent what we're
10:01AM 5 really asking is the ability to offer some proof to show that the
6 decision to terminate was not a rubber stamp, was not a simple
7 ratification of what the DOH recommended. And that's the purpose
8 of getting in the federal ALJ decision.

9 THE COURT: Well, Mr. Cooman makes the point that HCFA --
10:02AM 10 his words -- relied on the actions of its agent, the State, and
11 submitted the letter.

12 I'm sure you probably recall the exhibit number, but it
13 was a June letter from HCFA to Beechwood precluding them from
14 getting new pays, new Medicare/Medicaid.

10:02AM 15 And I guess he suggested that's all you need to say.
16 What happened two years later really doesn't add anything to that
17 because that, that is, the ALJ decision, happened long after the
18 December of 1999 decision of Commissioner Novello to sign off on
19 the ALJ's Report and Recommendation.

10:03AM 20 MR. SHEEHAN: The federal ALJ decision shows the scope
21 and degree of the decision. Shows -- even without getting into
22 the details, shows the evidence relied on; that it was not a
23 simple rubber stamp, it was not a simple ratification.

24 THE COURT: They took all the stuff from the State ALJ's
10:03AM 25 decision, they talked about it, they affirmed most of it except

1 for a couple of patients, as I recall.

2 THE COURT: They didn't go out with their own
3 investigators and do anything?

4 MR. SHEEHAN: They could have if they thought it was
10:03AM 5 necessary. They didn't think it was necessary. They would have.
6 They would have.

7 THE COURT: Doesn't sound like a rubber stamp. I don't
8 mean it pejoratively. I mean in the sense they took what the
9 State gave them and made a decision.

10:03AM 10 MR. SHEEHAN: Which was -- well, and part of our argument
11 is, Your Honor, the way I look at it comes down to two things:
12 Either bad data or --

13 THE COURT: You what?

14 MR. SHEEHAN: I'm sorry, Your Honor. The causation comes
10:04AM 15 down to, in my mind, two things: You have bad data, and I put
16 *Back vs. Hastings* in that area. You have bad information going to
17 the decision maker.

18 Or you have a bad motive. And partially what we're
19 receiving here is in addition to the -- by the rubber stamp
10:04AM 20 argument, by the ratification argument, is that HCFA was not
21 independent. That they, in one way or another, either were --
22 just did whatever DOH asked them to do or they had some part in
23 the bad motive or something else. And that's what we're trying to
24 rebut.

10:04AM 25 THE COURT: But I think the jury's focus has to be not on

1 what HCFA did, but it was on what the State -- again, I use State
2 so I don't have to repeat the six defendants -- it's the damages
3 that the jury believes should flow from what the State actors, all
4 employees of the Department of Health, did and I think that has to
5 be the focus.

6 And I am concerned, as in my *in limine* decision months
7 before this trial, when I precluded introduction of the ALJ's
8 decisions. I'm not going to repeat back to you what I said in
9 that, but this is not about what the federal government did. It's
10 what the State actors did. I think I reference the
11 Second Circuit's language, perhaps in another context, but related
12 context.

13 Well, all right. I guess I'm prepared to rule to this
14 extent: That I will not at this point rule as a matter of law
15 that no reasonable juror could fail to find proximate cause at
16 this stage. I believe it is a jury issue.

17 Damage is part of every case. Damages have to be
18 "proximately caused" by the either negligent acts or wrongful acts
19 of the defendants.

20 So I think neither side wants me to take it away from
21 the jury at this point. I won't. And I certainly don't intend to
22 preclude the defendants from arguing what's already in the record
23 concerning HCFA's actions and what it meant and what it precluded
24 plaintiffs from receiving.

25 But I will reserve today whether any other proof should

1 be put in front of the jury.

2 Mr. Sheehan, you know, the federal decisions are about
3 three and a half inches thick. So you've indicated to me -- I
4 view it as a relatively modest proposal to read some, but I don't
10:07AM 5 know which decision or -- I mean, it might be helpful in the next
6 day or so if you could just point to me the pages you think you
7 want to read or summarize.

8 Can you do that?

9 MR. SHEEHAN: Yes, Your Honor.

10:07AM 10 THE COURT: All right. Say by Wednesday noon?

11 MR. SHEEHAN: Yes, Your Honor.

12 THE COURT: Okay. Copy plaintiffs, of course.

13 MR. SHEEHAN: Yes, Your Honor.

14 THE COURT: I'm working up a proximate cause instruction,
10:08AM 15 which I think is much broader than what's been submitted to me so
16 far. The submission I got from the plaintiffs was pretty
17 straightforward and -- yeah, I mean, it was three lines.

18 MR. ROTHENBERG: Well, actually, Judge, there were a
19 couple other submissions that had to do with the proximate cause
10:08AM 20 issue. We broke them out into more than one.

21 I didn't mean to say that proximate cause was so simple
22 that three lines would do it, but we do have other instructions
23 about the proximate cause topic.

24 THE COURT: All right. Well, you're right. You had two
10:09AM 25 proposed instructions, 15 and 16 I guess.

1 MR. ROTHENBERG: 15, 16 and really 14, I think, is part
2 of it because it's the statute that talks about subjects or causes
3 to be subjected.

4 I hope the Court doesn't think that -- yeah, 14, 15 and
10:09AM 5 16. I hope the Court doesn't think we --

6 THE COURT: All right. Perhaps I misspoke. There were
7 three that -- and I guess we're working with those and sort of
8 focusing on three cases that I talked about, you know. I mean,
9 those three cases that I talked about that I gave you cites for --
10:09AM 10 the *Warner* case, and *Myers* and *Back* --

11 MR. ROTHENBERG: Correct.

12 THE COURT: -- they focused on a legitimate issue, and
13 that is the so-called intervening causes. But it's not that
14 simple for a tortfeasor to absolve itself or themselves from
10:10AM 15 responsibility just because somebody else acted on their bad
16 actions or retaliatory actions or discriminatory actions. So
17 we're still working on that at this point.

18 Like my normal practice, I don't think I'll say much in
19 terms of a preliminary charge. I mean, I'll say a few things to
10:10AM 20 just sort of help the jury focus on where we are and where they
21 are and what's not before them and what they have to decide. I
22 may summarize briefly my understanding as to the damages
23 plaintiffs seek.

24 I hadn't really thought about whether you all want to
10:11AM 25 make new opening statements.

1 MR. COOMAN: I think when we had our chambers conference,
2 Your Honor, I thought we had agreed it would be about 20 minutes
3 apiece or thereabouts.

4 MR. SHEEHAN: That sounds about right.

10:11AM 5 MR. COOMAN: No more than 30.

6 MR. SHEEHAN: That sounds about right.

7 THE COURT: Okay, I guess we did. All right.

8 You know, whenever you give speeches or whenever you do
9 anything, you have to keep in mind your audience. You've got a
10 jury that sat about seven weeks and are being asked to come back
11 again, and you're going to lose one of them after a week.

12 So I think they're a good, solid group of people that
13 will pay attention to the issue, but I don't think they want to
14 have this be, you know, the same old stuff that they've heard for
10:12AM 15 seven weeks.

16 Okay. Well, so I guess I'm reserving on that part of
17 the argument.

18 There are a couple other issues that we broached at our
19 conferences, and I guess this discussion we've had here for the
10:12AM 20 last half hour focuses also, in part, on the defendants'
21 motion *in limine* to have me reconsider my decision precluding the
22 introduction of the federal ALJ's decision. So we've talked about
23 that.

24 Initially the plaintiffs sought leave or urged me to
10:12AM 25 reconsider my *in limine* decision, which was docket number 285,

1 where I precluded the letters of interest that at least one, maybe
2 more people had expressed or submitted relative to purchasing
3 Beechwood.

4 But I thought as the discussion went on, my sense was
10:13AM 5 maybe as long as the expert could testify that he had considered
6 those things, as well as other things in coming to the expert's
7 decisions, maybe plaintiffs were not pushing that too much?

8 MR. ROTHENBERG: Well, that's certainly our secondary
9 argument. We did want the Court to reconsider that ruling in
10:13AM 10 light of the fact that as the proof demonstrated, there could
11 be -- there really could be no final and binding offer here
12 because the defendants would not permit the transfer of the
13 Certificate of Need.

14 So this was a circumstance where the best anybody was
10:14AM 15 ever going to see was a letter of interest or a letter of intent,
16 and not a final binding offer.

17 And so since it was the defendants' conduct that
18 prevented the issuance of a final and binding offer, that
19 perhaps -- and just to step back for one second, this is not a
10:14AM 20 hard and fast rule. There are cases indicating that this is fact
21 determinative, and it's a flexible rule and it's clearly the
22 general rule that a non-binding letter of intent is not
23 admissible. I agree.

24 But the cases make it clear that that's not an immutable
10:14AM 25 rule, and we think here where the defendants precluded the

1 transfer of the Certificate of Need so that there could never be a
2 final and binding offer, we wanted the Court to reconsider.

3 If you don't reconsider in terms of admissibility, we
4 would like a clarification that the experts can consider this and
10:15AM 5 that we certainly could cross-examine their expert about this
6 topic.

7 THE COURT: You anticipate that your expert would say,
8 among other things, coming to valuation, that he -- it is a he?

9 MR. ROTHENBERG: We have a he, yes.

10:15AM 10 THE COURT: He considered these letters of intent?

11 MR. ROTHENBERG: Well, he did look at the letters of
12 intent. It really didn't play a big role in his determination.

13 He used other methodologies, but he considered that and
14 looked at it kind of as an absolute minimum. I mean, it's in his
10:16AM 15 report.

16 THE COURT: All right. Well, does the defense disagree
17 or take a position that an expert is precluded from considering
18 material, even if that material happens not to be otherwise
19 admissible?

10:16AM 20 MR. SHEEHAN: As stated, we do not disagree with that
21 proposition, Your Honor. But the specific situation we're dealing
22 with here is letters of intent, which are not typically relied on
23 by valuation experts, which is what our expert will testify to,
24 which I don't --

10:16AM 25 THE COURT: Isn't that just a matter of experts jousting

1 whether it is something they can or not?

2 Mr. Rothenberg suggested that their expert, his proffer
3 didn't sound like based his entire decision on that. It was
4 something he had for him.

10:17AM 5 MR. SHEEHAN: What it sounds like, Your Honor, his expert
6 will say something along the lines of the minimum possible value
7 for Beechwood is \$8.1 million based on the letter of intent I
8 reviewed.

9 And to that extent the defense does argue that testimony
10:17AM 10 would be improper, given that it's -- first, it's based on
11 evidence that's not normally relied on. And, second, it's really
12 just parroting something that we have no way to cross-examine.

13 THE COURT: Why can't you cross-examine him?

14 MR. SHEEHAN: We don't have the people that created the
10:17AM 15 letter of intent on the stand, and because there's no way to
16 disagree with the conjecture about what the letter of intent
17 really represents.

18 THE COURT: Well, your expert, though, apparently is
19 going to say it's not something you rely upon or you shouldn't
10:17AM 20 so --

21 MR. SHEEHAN: But we have no way of knowing what that
22 \$8.1 million number is based on, and this \$8.1 number is just as
23 unreliable as it was --

24 THE COURT: I thought it was one point something?

10:18AM 25 MR. ROTHENBERG: There's a series of them and it starts

1 with -- I can't remember if it's 8.1, but it's something in that
2 vicinity. And then there was actually a declining curve as the
3 fall went on.

4 THE COURT: These are reflected in the letters of intent?

10:18AM 5 MR. ROTHENBERG: Yes. The numbers are in the letters of
6 intent.

7 But if I may, Your Honor? Whether it's something the
8 expert relied upon or not, that's something that's the subject of
9 cross-examination. If their expert says "I would never rely on
10:18AM 10 it," that's one thing and our expert can say whatever he wants to
11 say about it.

12 Secondly, the fact that you can't cross-examine the
13 author, that's true of every document that the experts are going
14 to work with. I mean, the experts have a pile of financial
10:18AM 15 documents that are created by accountants and expenses and
16 everything else. Nobody can cross-examine any of the actors
17 who -- other than, I suppose, Mr. Chambery who will be on the
18 stand -- but I don't think that argument has any applicability to
19 this phase of the case.

10:19AM 20 MR. SHEEHAN: With all due respect, Your Honor, I
21 disagree. The difference there is the other documents that the
22 experts are relying on are having a methodology applied to them.

23 In this case it doesn't cash flow one way or another and
24 a number is generated, you can cross-examine the author of the
10:19AM 25 number because the author of the number will be on the stand.

1 In this particular case all Mr. Canessa is going to do
2 is testify to \$8.1 million based on a number he's getting from a
3 letter of intent. There's no analysis. He's basically just
4 reading the letter of intent to us, and that's inadmissible.

10:19AM

5 But they should not be able to offer that in the first
6 instance as evidence of a floor of value.

7 THE COURT: Well, generally it is the rule that the
8 letters of intent are not admissible. I stated that in my
9 *in limine* decision, and I'm not inclined to change that.

10:20AM

10 But I think the rule relating to experts and what
11 experts can consider, I think, is quite broad. And the defense
12 doesn't seem to dispute the general rule that experts may consider
13 even matters that might otherwise be inadmissible. Experts are
14 subject to cross-examination. We're going to have, apparently,
15 experts that disagree about valuation, and this may be part of it.

10:20AM

16 So I will not preclude the expert from referencing the
17 letter or letters of intent, giving his opinion as to its
18 significance or their significance in his calculation as to the
19 ultimate loss or damage here.

10:20AM

20 So that's my ruling on that.

21 MR. ROTHENBERG: Yes, Your Honor.

22 MR. SHEEHAN: Your Honor, if I may? Can I get
23 clarification as to exactly what Mr. Canessa will be allowed to
24 testify to?

10:21AM

25 THE COURT: What don't you understand?

1 MR. SHEEHAN: Whether or not he'll be able to testify as
2 to the floor of value based on his review of the letter of intent.

3 THE COURT: I don't know if that is his testimony, but he
4 can -- certainly he can rely on the letters of intent and give it
10:21AM 5 what weight he thinks it deserves, so...

6 MR. SHEEHAN: Just then for the record, Your Honor, we
7 would just state the objection that he should not be allowed to
8 testify on the number based --

9 THE COURT: I think your record is made on that score.

10:22AM 10 Well, there are just two issues. In terms of plaintiffs
11 sort of summary of damages focus on post-closure losses and
12 pre-closure lost profits, I don't know exactly what that is, but
13 is this something Mr. Chambery is testifying about or the expert
14 or both or --

10:22AM 15 MR. COOMAN: Both, Your Honor.

16 THE COURT: In a nutshell what's your --

17 MR. COOMAN: What's the distinction between the two?

18 THE COURT: Yeah.

19 MR. COOMAN: The pre-closure loss is a measure of the
10:22AM 20 damages caused by the adverse actions of the defendants taking
21 place prior to the July 17th cutoff. In other words, the decline
22 of Beechwood's business during those months from April through
23 July.

24 THE COURT: You mean people stopped going there?

10:23AM 25 MR. COOMAN: Yes, exactly. Once you have the adverse

1 publicity taking place and HCFA -- or rather DOH puts out a, you
2 know, a press release in June saying, you know, the place is
3 terrible, it's going down, your ability to attract any private pay
4 residents or anybody else to come is --

10:23AM 5 THE COURT: Is it measurable? Do you have 80 patients at
6 this date and then it was 60 or 40?

7 MR. COOMAN: I don't believe so. I don't remember
8 exactly the methodology by which that was calculated, but it is a
9 piece of what our expert looked at.

10:23AM 10 THE COURT: Let's talk about the lost wages that
11 Mr. Chambery seeks here. As I understand it, you seek to have the
12 jury award Mr. Chambery lost wages from July of 1999 to the trial,
13 which seems like an exceptionally long period of time here and
14 just seems sort of like asking for a lot here that, here again,
10:24AM 15 this may not be as a matter of law, but it's over a decade.

16 Are you still seeking to ask the jury to award him lost
17 wages for a decade?

18 MR. COOMAN: Yes. I think it's a clear jury question
19 when they hear what he had to undertake during that period of
10:24AM 20 time: How long it took to sweep up, mop up, deal with the
21 devasation that the defendants had caused. And then, obviously,
22 given the tremendous damage to name and reputation, his ability to
23 find any reasonable employment was precluded.

24 And, obviously, defendants are going to make the
10:25AM 25 arguments they're going to make: That's not really true. But any

1 argument about mitigation is their burden, as I understand the
2 instructions in the case law. So they're welcome to argue
3 mitigation all they want and bear the burden of proof on that
4 issue.

10:25AM

5 THE COURT: As I recall, in dealing with mitigation
6 issues in the past, you know, if someone is employed as an
7 accountant, that mitigation doesn't require, I don't think, that
8 he or she, you know, work at McDonalds.

10:26AM

9 I mean, I think there's some -- I don't recall the exact
10 nomenclature of the language, but it's a suit by similar position.
11 I don't think you have to go digging ditches if you were -- is
12 that your understanding?

10:26AM

13 MR. COOMAN: That's our understanding too, Your Honor.
14 As I say, the defendants, I think, bear a rather substantial
15 burden here of showing that an entrepreneur with the kind of
16 talent and background that Mr. Chambery had, having been
17 essentially blackballed by virtue of what happened here, when
18 you're the only person in New York State to have your operating
19 certificate revoked, and you're the subject of all this adverse
20 publicity, and it's a little difficult to argue that, you know,
21 how he ought to be able to go in and be the COO or CEO of some
22 other healthcare organization.

10:26AM

10:26AM

23 THE COURT: You're going to try to convince the jury
24 there's no other work in the healthcare field for a decade? He
25 couldn't -- I guess that's what you intend to argue?

1 MR. COOMAN: Right. It's in combination with the fact
2 that the daunting challenge of what he's had to undertake in terms
3 of mop-up operations, multiple pieces of litigation all related to
4 the aftermath of the closure and, you know, the jury will have to
5 assess all that.

10:27AM

6 THE COURT: Certainly there was some -- you say "mop-up,"
7 and there's post-closure losses that I think cover some of that.
8 I certainly -- well, I think I understand your position. I don't
9 think at this stage I'm prepared to say as a matter of law you
10 can't seek to have the jury compensate him.

10:27AM

11 I guess the Court broached the topic of indemnification,
12 and I think the parties have exchanged some memorandum, which have
13 been filed. And I think plaintiffs conscientiously have provided
14 the Court with law that suggests that at least as the proof stands
15 now, advising the jury that the defendants are going to be
16 indemnified is not good, could be reversible error. I guess it's
17 tantamount to advising the jury that there's "insurance."

10:28AM

18 But I just think defendants have to be very careful, and
19 there's a fine line as to whether somehow -- most likely
20 inadvertently -- the defendants sort of, you know, don't make
21 these poor defendants have to pay this kind of money might cause
22 the Court to reconsider whether the Court, it might be appropriate
23 to say something.

10:28AM

24 I mean, there's no request for punitives. And I think
25 in our pretrial -- or our pretrial of the damage phase I was

10:29AM

1 advised that none of the defendants would testify, present any
2 evidence about their assets or -- that's still the case, I assume?

3 MR. SHEEHAN: Yes, Your Honor.

4 THE COURT: So I haven't worked out the exact charge, but
10:29AM 5 I think I'll just tell the jury you've got to focus on what the
6 plaintiffs' damages were, period.

7 I'll try to get you a draft of what I intend to say.
8 I'm toying with the idea of saying -- essentially adding a line,
9 you know, you shouldn't worry about how it's to be paid.

10:30AM 10 So why don't I get you a draft of that? You can take a
11 look at it. I mean, that's pretty much what juries do anyway. I
12 don't think they -- unless you're talking about punitives, their
13 job is to simply tell us what the damages are. It's not their
14 worry or task to decide how it gets paid or who pays it or whether
10:30AM 15 there's insurance or not.

16 I mean, the jury's not stupid, I don't think. They know
17 these people are all employed by the State of New York. I think a
18 more interesting issue may be if the jury comes back and asks us a
19 question, you know, are these people going to have to pay this?

10:31AM 20 But I guess that's something we can look forward to dealing with
21 at another time. I mean, I would probably say forget about it,
22 it's not up to you to worry about that.

23 MR. ROTHENBERG: I think that would be fine, Judge.
24 That's like telling them -- that's like telling them not to base
10:31AM 25 their decision on sympathy or on any factor other than the

1 damages. I mean, it's part and parcel of that same charge. So I
2 think that additional sentence would be fine.

3 MR. SHEEHAN: Your Honor, we would object to that
4 additional sentence. We think it's tantamount to raising the
10:31AM 5 indemnification issue by suggesting someone other than the
6 defendants will be paying for the verdict.

7 THE COURT: Okay. I'll continue to ponder that and will
8 give you a draft of what I think I would like to do.

9 Again, you know, as is often the case, when instructing
10:32AM 10 the jury sometimes you have to see how the proof develops. But I
11 think we have a pretty good idea based on preparation of counsel
12 the issues that we're going to face, so....

13 Obviously, the prejudgment interest and attorney's fees
14 are something that is not before this jury.

10:33AM 15 Mr. Sheehan, I did when I was talking to Mr. Cooman
16 indicate that the verdict sheet would probably have multiple lines
17 because there are different categories of damages, and I think it
18 might be helpful to review in court to see what the jury did with
19 the various items of damages that are presented to them.

10:33AM 20 Does the State have any objection to that?

21 MR. SHEEHAN: No, Your Honor.

22 THE COURT: Okay. Well, I will have a copy of the
23 verdict form for you to consider certainly before it goes to the
24 jury.

10:33AM 25 All right. Well, we talked about a lot of things at our

1 pretrial. Anything else we need to chew on here?

2 MR. COOMAN: I think the only other -- I don't have it
3 covered, Your Honor, is our motion to quash the two subpoenas that
4 have been issued.

10:34AM 5 THE COURT: I was away all weekend and I just got that
6 this morning so I didn't -- actually knowing you all, I should
7 have checked Sunday night at 10 o'clock to see what had been
8 filed, but this was filed on Friday and I candidly haven't had a
9 chance.

10:34AM 10 I discussed it a little bit with my law clerks, but I
11 haven't really had a chance. But the gist of it, I guess, is that
12 there's a subpoena for financial records of the Chamberys' tax
13 returns?

14 MR. SHEEHAN: Just tax returns, and the particular years
10:34AM 15 for Mr. Chambery regarding his lost wages to evaluate lost wages
16 claims. One year of tax returns from Olive Chambery regarding a
17 transfer of an interest in Beechwood, and particularly for that
18 issue.

19 THE COURT: I'm sorry. Particularly?

10:35AM 20 MR. SHEEHAN: There was a 9% transfer from Olive Chambery
21 to Brook Chambery in 1999, and we wanted documents related to that
22 transfer because there was a number -- a \$95,000 number attached
23 to that transfer, and we wanted to examine the underlying basis
24 for that number.

10:35AM 25 THE COURT: \$95,000?

1 MR. SHEEHAN: Right. Was paid by Brook Chambery to Olive
2 Chambery for 9% of Beechwood.

3 THE COURT: Well, I understand the gist of the
4 plaintiffs' objection here. This is, you know, an hour late and a
10:35AM 5 mile short. It comes, I don't know, five years after discovery is
6 closed -- or many years. I mean, talk about late.

7 I don't have all the scheduling orders in front of me
8 now in terms of discovery and when it concluded, but to say there
9 was lots of discovery in this case, I think, probably would be an
10:36AM 10 understatement.

11 So since I haven't read the motion in full, Mr. Cooman,
12 what is your objection?

13 MR. COOMAN: Timing on that, Your Honor, is defendants
14 originally made a request for 17 years of personal tax returns way
10:36AM 15 back at the beginning. That was objected to as one of those
16 things that presumptively you could get whatever information you
17 wanted from some other source.

18 There was no follow-up. There was no additional
19 discovery request. And, finally, in the summer of 2010, which is
10:36AM 20 two years ago, there was a deposition of Mr. Chambery, 231 page
21 transcript. They never asked him -- never asked him about income
22 other than sort of "Are you employed now?" To which he said,
23 "Dealing with this lawsuit, yes." And that was the extent of the
24 testimony.

10:36AM 25 There was never a follow-up request for anything related

1 to that, and we've cited one or two cases to the Court that say
2 really that's waiver by conduct. If you have a deposition where
3 you can ask about income, and for whatever reason they didn't do
4 it, whether they were so confident it would be a no cause verdict
10:37AM 5 that this just didn't matter getting into, but we think it's
6 inappropriate.

7 But then beyond that, we said, okay, our response to the
8 exchange of letters that I've had with Mr. Sheehan was we'll give
9 you redacted returns showing you there's nothing on the W-2 line,
10:37AM 10 there's no Schedule C, Mr. Chambery had no income.

11 They didn't want that. They said, no, we've got to have
12 the whole return.

13 THE COURT: This exchange took place --

14 MR. COOMAN: Within the last month, July. I said to
10:37AM 15 Mr. Sheehan we'll give you redacted things because your only claim
16 is, well, if he had income from some other sources, we ought to be
17 able to count that as mitigation.

18 And we've said -- and now Mr. Chambery's put an
19 affidavit into the Court on this motion saying, "I wasn't
10:37AM 20 employed, I had no W-2, I didn't have any other business interest,
21 I had no 1099 other than for interest and dividends and capital
22 gains."

23 And so our position was they didn't want redacted
24 either, and we moved to quash the subpoena. They should get
10:38AM 25 nothing.

1 And, frankly, they can ask Mr. Chambery on the witness
2 stand, "Did you work? Did you have a W-2?" He'll tell them
3 again, "I didn't." And so the need for those tax returns
4 discovery has passed, and they shouldn't get them.

10:38AM 5 THE COURT: Was the 1099 information willing to be
6 disclosed?

7 MR. COOMAN: We would have given 1099's if it represented
8 earnings, but the only 1099's are from interest and dividends. We
9 shouldn't be able to -- it's completely irrelevant to reveal
10:38AM 10 things like that that by deduction then show net worth.

11 And that's clearly not a relevant consideration, and
12 there's just no reason why the tax returns should be produced.

13 MR. SHEEHAN: Your Honor, the trouble with what they were
14 offering is there are certain types of income that wouldn't
10:39AM 15 necessarily show up on the forms they wanted to give us.

16 The example we gave was day trading. Someone could
17 invest a lot of money in the stock market in -- day trading in the
18 stock market and make millions of dollars. That happens. That's
19 what we wanted to check.

10:39AM 20 We offered to do a pre-production review just to see if
21 there was anything to fight about, and they didn't want us to do
22 that; or post-production redaction to keep net worth elements out.
23 They didn't want that either.

24 THE COURT: But you concede that net worth inquiry is not
10:39AM 25 germane to the jury's task here?

1 MR. SHEEHAN: Yes, Your Honor.

2 THE COURT: All right. Well, subject to my reading --
3 well, have you responded to this?

4 MR. SHEEHAN: No, Your Honor. We got it on Thursday as
10:39AM 5 well, and I read it and I read some of the cases, the two cases
6 that Mr. Cooman was talking about. I read those. They're not
7 lost wages cases.

8 THE COURT: I know you've got a lot to do. I mean, are
9 you content with your stated position here or do you want to file
10:40AM 10 something?

11 MR. SHEEHAN: I did want to look up -- there was a little
12 bit more research, but we should be able to do that very quickly,
13 Your Honor.

14 THE COURT: Well, I need it by tomorrow then --

10:40AM 15 MR. SHEEHAN: Sure, Your Honor. Yes, Your Honor.

16 THE COURT: -- 5 o'clock. I guess unless you overwhelm
17 me, Mr. Sheehan, with stuff, my inclination is to grant the
18 plaintiffs' motion that it's much too late.

19 That there was discovery, as Mr. Cooman has articulated
10:40AM 20 here, that went on for months and years. And essentially this is
21 in the middle of the trial, and I just think it comes much too
22 late. And I think to the extent plaintiffs have offered some
23 accommodation, that's more than they had to. But to the extent
24 they've offered that, fine.

10:41AM 25 But I guess my tentative ruling is that I grant the

1 motion to quash based on the timeliness or untimeliness of it. If
2 I decide after reviewing Mr. Sheehan's submissions to change my
3 ruling, I'll let you know.

4 MR. COOMAN: The second prong of it, Your Honor, there
10:41AM 5 was a request for Olive Chambery's 1999 tax return ostensibly
6 because it might reveal information about the transaction in early
7 1999 whereby Brook Chambery acquired 9% of his mother's interest
8 in the nursing home for an ascribed value of \$95,000.

9 Two or three points. Number one, the practical answer
10:41AM 10 is the return is long gone. We've checked with both Olive
11 Chambery and her CPA; there's no return. And there was never a
12 gift tax return in any event. So the answer is, it can't be
13 produced.

14 Secondly, we think this whole 9% interest thing is, I
10:42AM 15 guess, kind of a red herring. Apparently for background, in the
16 State of New York when somebody wants to transfer any interest in
17 a nursing home, you can't just do that. You may do it only up to
18 less than 10% without Department of Health approval. Any transfer
19 in excess of 10%, you have to have "establishment approval" from
10:42AM 20 the Department of Health.

21 So, for example, if Mrs. Chambery had wanted to give
22 Brook a 50% interest in the home, the Department of Health would
23 have had to approve that. The Department of Health did not have
24 to approve something up to 10%.

10:42AM 25 So a 9% interest transfer was made early in 1999. There

1 was an ascribed value to that of \$95,000. And I guess their
2 expert -- I mean, that's just an established fact, undisputed.
3 For some reason they want more information about that, that how
4 did you get to the \$95,000?

10:43AM

5 And in our papers we pointed out nothing about that
6 transaction really has any relevance to value because it's not
7 arm's length. I mean, a mother-son transfer for an ascribed value
8 doesn't mean anything about what the place is really worth.

10:43AM

9 It was a minority interest, a non-controlling interest.
10 It obviously wasn't an arm's length, and Mr. Chambery's affidavit
11 on our motion to quash has made clear there was no appraisal done
12 of the business in connection with the 9% or the ascribed number
13 of \$95,000.

10:43AM

14 THE COURT: Isn't the loss here the loss to the
15 partnership?

16 MR. COOMAN: Correct.

17 THE COURT: Which includes --

18 MR. COOMAN: To both.

19 THE COURT: -- two people?

10:43AM

20 MR. COOMAN: So I think the argument -- my guess is the
21 argument is something like, well, if a 9% interest is worth
22 95,000, it must be that early in 1999 the value of the business
23 was only 10 times that value. It was only worth a million bucks,
24 you know.

10:44AM

25 THE COURT: You can make that argument, I guess, but it

1 sounds like, Mr. Cooman, Mr. Sheehan, the facts that Mr. Cooman
2 just articulated are already matters of public record and public
3 knowledge.

4 MR. SHEEHAN: If the --

10:44AM 5 THE COURT: Just -- sorry to interrupt, but you can
6 answer this part of my question, too. Mr. Cooman hasn't yet
7 mentioned the delay in seeking this information also.

8 MR. COOMAN: That's also true.

9 THE COURT: Was Mrs. Chambery deposed?

10:44AM 10 MR. COOMAN: She was never even noticed for deposition.

11 THE COURT: All right.

12 MR. COOMAN: Or it never came to pass. Maybe it was
13 noticed and it was never requested.

14 THE COURT: All right. Mr. Sheehan, anything to say
10:44AM 15 relative to any of those matters?

16 MR. SHEEHAN: One thing, Your Honor. I'm not exactly
17 sure what we learned about the 9% transfer. I think it came over
18 in some of the expert documents. I'm not sure.

19 But that's beside the point. If the returns are not
10:45AM 20 available and the underlying documents that relate to the \$95,000,
21 if any, are not available, and there was no gift tax return, it
22 sounds like there's no documents that could even be produced in
23 response to the subpoena. So that would seem to end the issue all
24 together.

10:45AM 25 THE COURT: Make it moot. All right, so be it. Nothing

1 to produce. And even if there were, I think the Court would be
2 inclined to not require it because of the delay. Seems like most
3 of the information you got; you can make from it whatever you
4 think is appropriate.

10:45AM 5 All right, anything else from plaintiff?

6 MR. COOMAN: That's it, Your Honor.

7 THE COURT: Anything else from the defense?

8 MR. SHEEHAN: Just one issue, Your Honor. During one of
9 the conferences we had we were describing the witnesses we had.

10:46AM 10 Defense has two experts; plaintiffs have one expert, Mr. Chambery
11 his mother Olive Chambery, and two other fact witnesses that are
12 supposed to lay the predicate facts, is my understanding, for the
13 expert report.

14 I don't know exactly what those two extra witnesses
10:46AM 15 could say that wouldn't be hearsay. So I was going to ask for an
16 offer of proof as to what those two witnesses would be testifying
17 to.

18 MR. COOMAN: I think when that discussion was had we were
19 still thinking about or deciding what had to come in as documented
10:46AM 20 evidence before the expert could testify, but I think we clarified
21 that at the conference. The expert can rely on stuff that's not
22 in evidence.

23 So there won't be other -- there won't be other fact
24 witnesses undergirding that. Our intended proof is Olive, Brook
10:46AM 25 and James Canessa.

1 MR. SHEEHAN: Your Honor --

2 THE COURT: All right. If you change your mind, you've
3 got to let us all know quickly.

4 Leaving aside this ALJ, federal ALJ stuff that we've
10:47AM 5 talked about, what's your list of witnesses?

6 MR. SHEEHAN: Maureen Rutecki and James Marasco, the two
7 experts, Your Honor.

8 THE COURT: Two, okay. All right. Could you just sit
9 tight for a few minutes? Let's take a break. I'd just like to
10:47AM 10 talk to my law clerks and see if there's anything else maybe we
11 should discuss here.

12 MR. COOMAN: One other thing while you're doing that,
13 Your Honor. My recollection is that we decided on Monday the 20th
14 we're starting at 9:00 and going a full day; but then after that,
10:47AM 15 the subsequent days that week, are reverting to our 8:00 or 8:30
16 to 1:00 or 2:00.

17 THE COURT: I thought we decided full days?

18 MR. SHEEHAN: I thought so too, Your Honor, just in case.

19 THE COURT: I'll look at my -- I don't have my notes on
10:48AM 20 that, but I will.

21 MR. COOMAN: Which is fine. We just for planning
22 purposes --

23 MR. SHEEHAN: I thought so.

24 THE COURT: I think we were going to see if there was any
10:48AM 25 juror problems with doing that.

1 MR. COOMAN: That's right.

2 THE COURT: Because I do recall one of the jurors during
3 deliberations, I think, had to go to work or something in the
4 afternoon. So I think we sort of left that up to be decided
5 depending on juror convenience.

10:48AM

6 So my preference is let's do it -- let's start 9:00-ish
7 and go 4:00-ish. Ms. Rand has been away, but I think our last
8 missive to them, that is, the jury, was if there are any problems,
9 you should let us know. We haven't heard anything. I think they
10 were alerted to this full day thing, but we'll work on that.

10:48AM

11 MR. COOMAN: Thank you.

12 THE COURT: All right. Stand in place for a few minutes
13 and we'll be right back.

14 (WHEREUPON, there was a pause in the proceeding.)

11:01AM

15 THE COURT: I think we've covered everything. Maybe just
16 two things. During the trial plaintiffs -- both plaintiffs'
17 counsel presented. Is that still the same tact here?

18 MR. COOMAN: Yes, Your Honor. Yes, we're splitting the
19 witnesses.

11:01AM

20 THE COURT: How about the defense?

21 MR. SHEEHAN: I think it will just be me, Your Honor.

22 THE COURT: Okay. As far as I offer you the opportunity
23 to submit a proposed verdict sheet if you'd like.

24 MR. ROTHENBERG: We'll take you up on that. I'll get
25 it -- how soon do you want that?

11:02AM

1 THE COURT: Well, as soon as possible because I'm gone
2 all next week. So like Wednesday or Tuesday?

3 MR. ROTHENBERG: I can do it faster than that. I mean,
4 how about the end of business tomorrow? Tuesday?

11:02AM 5 THE COURT: That's fine.

6 MR. ROTHENBERG: Okay.

7 THE COURT: How about do you want to submit one, too?

8 MR. SHEEHAN: Yes, please, Your Honor.

9 MR. LEVINE: Do you want us to respond to theirs or do a
11:02AM 10 separate one?

11 MR. ROTHENBERG: I'll e-mail as soon as we have ours in
12 some kind of close to final form. I'll e-mail Mr. Sheehan and
13 Mr. Levine.

14 THE COURT: If you have any objections, get it to me by
11:02AM 15 the next close of business.

16 MR. ROTHENBERG: We're going to keep it simple again, I
17 know that.

18 THE COURT: The KISS principle: Keep it simple stupid.

19 MR. ROTHENBERG: We omitted one S. We spell it K-I-S,
11:03AM 20 Your Honor.

21 THE COURT: Whenever I give the speech, that's when my
22 wife tells me "don't forget the KISS principle."

23 Okay, I guess we all have our tasks and our deadlines
24 and we will be talking to you, I'm sure, and --

11:03AM 25 MR. ROTHENBERG: Thank you, Your Honor.

1 MR. COOMAN: Thank you, Your Honor.

2 THE COURT: Okay, we'll see you soon enough.

3 MR. SHEEHAN: Thank you, Your Honor.

4 (WHEREUPON, the proceedings adjourned at 11:01 a.m.)

5 * * *

6 CERTIFICATE OF REPORTER

7

8 In accordance with 28, U.S.C., 753(b), I certify that
9 these original notes are a true and correct record of proceedings
10 in the United States District Court for the Western District of
11 New York before the Honorable David G. Larimer on August 6th,
12 2012.

13

14 S/ Christi A. Macri

15 Christi A. Macri, FAPR-RMR-CRR-CRI
16 Official Court Reporter

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